



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: American Biomedical Instrumentation, Inc.  
File: B-228598  
Date: February 22, 1988

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### DIGEST

Protester fails to show that denial by Small Business Administration (SBA) of a certificate of competency (COC) was the result of fraud, bad faith, or failure to consider information vital to the protester's responsibility where, in connection with solicitation for maintenance of X-ray equipment, the record shows that SBA reasonably relied on contracting agency's conclusion that the protester failed to document performance of equipment calibration services as required under the prior contract, and protester was aware that prior performance was in issue in COC proceeding and was given adequate opportunity to respond.

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### DECISION

American Biomedical Instrumentation, Inc., protests the failure of the Small Business Administration (SBA) to issue a certificate of competency (COC) with respect to request for quotations (RFQ) No. DAAAG60-87-Q-7316, issued by the Department of the Army for the service and maintenance of X-ray equipment at the Keller Army Hospital, West Point, New York. The protester contends that SBA's reliance on "unfounded" allegations of the contracting agency regarding its performance on a prior contract was arbitrary, capricious, and evidenced bad faith. American also protests SBA's refusal to reconsider its decision in light of information which the protester characterizes as vital to the issue of its responsibility.

~~We~~ deny the protest.

The RFQ was issued on August 10, 1987, with a closing date of August 21. It contemplated a 1-year, fixed-price contract for the service and maintenance of the Hospital's X-ray equipment beginning October 1, 1987, including the performance of a calibration procedure in December.

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American submitted the apparent low quotation, but was determined by the contracting officer to be nonresponsive based on a report of the Hospital's Chief of Radiology concerning its performance on a virtually identical contract for the period ending September 30, 1987. American's performance was assessed as deficient because it allegedly had failed to diagnose a persistent fluoroscopy problem, had missed numerous scheduled appointments, and had delayed correcting problems due to a lack of parts for the X-ray equipment. On September 15, the matter was referred to SBA for a COC proceeding. The protester then filed a timely COC application and SBA conducted an investigation.

As part of the investigation, an SBA industrial specialist visited American's facility on October 2 and spoke with the company's president. By that time the issue of missed appointments under American's prior contract had come to focus on a missed appointment to calibrate the X-ray equipment. The prior contract called for a calibration procedure to be performed in June 1987; it also required the contractor to document the calibration using two forms, DD Form 2163, a sticker affixed to the equipment requiring a signature to certify that the services had been performed, and DD Form 2164, a worksheet showing the calibration data. As with all services performed under the contract, the calibration had to be inspected and approved by the Hospital's Chief of Biomedical Maintenance.

SBA reports that the fluoroscopy problem and the missed calibration appointment were discussed during the October 2 visit, and that the protester provided information with respect to both issues. As evidence of a successfully completed calibration, American presented SBA with a copy of a service order dated July 30, together with an eight-page computer printout of data which American contends shows that the calibration was performed. American furnished no evidence, however, that it had completed the required DD Forms 2163 and 2164 to document the calibration. At the conclusion of the visit, the protester was advised that the SBA official would be preparing a report on its COC application for an October 8 meeting of the COC Review Committee.

On October 8, the Hospital's contracting specialist spoke to SBA concerning American's contract performance. The Army official stated that the protester was "in default" on its contract as the firm had yet to submit completed DD Forms 2163 and 2164; according to the official, all that American had provided with regard to performance of the required calibration procedure were the July 30 service report and a computer printout "without explanation." Throughout the day the SBA industrial specialist states that he tried, to no

avail, to contact American for a response to the Army's presentation. At the end of the day the COC Review Committee voted unanimously to deny American's COC application based on its failure to perform the contract calibration requirements. The Committee's recommendation was approved by SBA's Assistant Regional Administrator on October 13.

Upon learning of the denial of the COC, the protester contacted SBA's industrial specialist on October 19, and stated that the firm had never been subject to default proceedings under its contract and in fact had performed the required calibration and provided the Army with the required DD Form 2164. SBA refused to reconsider its position.

American argues that SBA acted improperly in basing its COC denial on the October 8 representations of the Army, and in not according the firm an opportunity to respond to those allegations prior to making its decision on the COC application.

Our Office generally does not review SBA decisions to issue or not to issue a COC since, under 15 U.S.C. § 637(b)(7) (1982), SBA has conclusive authority to rule on the responsibility of small business concerns. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(3) (1987). We do so here, however, in light of American's initial allegation and showing concerning SBA's possible bad faith and failure to consider vital information. In a case such as this, to establish bad faith, a protester must present virtually irrefutable proof that government officials had a "specific and malicious intent" to injure the protester. Sermor, Inc., B-210872, July 13, 1983, 83-2 CPD ¶ 87. For the reasons stated below, we conclude that the protester has not made the requisite showing with respect to SBA's action.

The record establishes that American never submitted a DD Form 2164 which reflected completion of the required calibration procedure.<sup>1/</sup> In its initial protest submission, the firm suggested that a DD Form 2164 it submitted on July 10 satisfied the contract requirement. In its comments on the agency reports, however, American recharacterized the July 10 form as documenting only the "out of calibration status" of the equipment, and suggested that the requirement for filing a "second" DD Form 2164 showing that the calibration actually was performed had been waived by authorized

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<sup>1/</sup> With regard to the other form required in connection with the calibration procedure, the DD Form 2163 sticker affixed to the equipment, the Army concedes that the sticker was signed by American's representative during a service call.

Army officials at the time the firm prepared the July 30 service report. This position is without merit. The service report is a one-page standard form prepared by American which briefly describes the reason for a service call and the action taken. The July 30 service report submitted by American merely describes the problem as "calibration of type No. 1 small and large filament"; it contains no data of the type called for by the DD Form 2164 to evidence that the procedure had been performed, but instead promises that a "data table" would be constructed the next day.

As support for its contention that the Army waived the requirement for a DD Form 2164, American states that, upon completion of the service call on July 30, its service representative was told by two Hospital employees, including the Chief of Biomedical Maintenance, that it would be acceptable for the firm to prepare a data table and later mail it to the Hospital. In our view, this statement at most indicates the Army's agreement that American need not furnish the data table immediately after completion of the service call. It does not indicate either that the data table was to be regarded as a substitute for the DD Form 2164, or that the Chief of Biomedical Maintenance waived the Army's right under the contract to approve completion of the calibration procedure.

While it appears that the Army never began procedures to terminate the protester's contract for default, the record supports the Army's position that American had not performed in accordance with the terms of that contract at least with respect to the calibration requirement, and the facts underlying this failure to perform were accurately communicated to the SBA by the Army immediately prior to its decision on the COC application. A nonresponsibility determination may be based upon the contracting agency's reasonable perception of inadequate prior performance, even where the protester disputes the agency's interpretation of the facts and the agency did not terminate the prior contract for default. Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235. Accordingly, we cannot conclude that SBA improperly relied on the Army's statements relating to American's failure to document the calibration procedure.

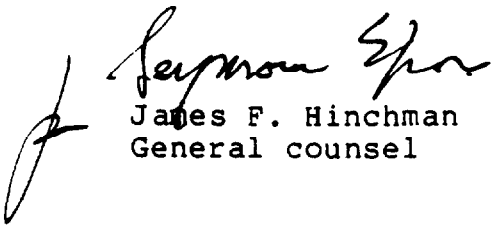
During the pendency of the COC matter before SBA, American was specifically advised that it bore the burden of proving its responsibility by submitting all information relevant to its past contract performance. See AquaSciences International, Inc.--Request for Reconsideration, B-225452.2, Feb. 5, 1987, 87-1 CPD ¶ 127. Yet, during the facility visit on October 2, American furnished no evidence that it had completed either a DD Form 2163 or 2164, and now suggests that, at the time, it had no reason to know that its

failure to submit the forms to the Army during contract performance was in question. The protester's position clearly lacks merit. American concedes that it was aware of the requirement to complete the forms and that the issue of a missed calibration appointment was raised with it by SBA. In addition, American provided SBA only with a copy of the July 30 service report and the data table. Since American knew the contract required the DD Forms in connection with the calibration, in our view, American should have realized the need to explain why its service report and data table were acceptable substitutes for the forms. Further, by its own admission, American was asked by the Army on October 1--the day before the SBA visit--to provide the agency with a copy of a completed DD Form 2164, and thus should have known that submission of the forms was an issue under consideration.

American also contends that SBA acted improperly in not permitting it to respond to the allegations the Army made on October 8, immediately before the decision to deny the COC was made. As a preliminary matter, SBA was not required to solicit American's response to the Army's October 8 comments since they concerned American's performance of the calibration under its prior contract, a matter which American already knew was in issue in the COC proceeding. See The Pepperdine Corp., B-225490, Dec. 24, 1986, 86-2 CPD ¶ 717. Nevertheless, SBA states that it attempted several times on October 8 to contact American for its response. While American disagrees as to the number of telephone messages left by the SBA official, it concedes that at least one message was received and that American's president, who was handling the COC matter, was unavailable the entire day. Under these circumstances, SBA clearly gave American adequate opportunity to address the calibration issue.

Finally, we note that the information provided to SBA in support of the protester's request for reconsideration of its COC denial does not materially bear upon its underlying failure to perform in accordance with its contract and is therefore not in any way "vital" to its responsibility. Accordingly, we have no basis for concluding that SBA's refusal to reconsider its position was improper, as alleged by the protester.

The protest is denied.



James F. Hinchman  
General counsel